

(a) Status Report on BSAI Amendment 71

BSAI Amendment 71 was passed by the Council in June 2002. The Council's recommendations were comprised of two categories of specific revisions to the BSAI FMP and a number of proposed regulatory amendments, some of which are directly related to the FMP amendments and some of which are not associated with the FMP amendment text. The Council organized its recommendations into eight issues, which are categorized below:

1. The CDQ Allocation Process:
 - Issue 1 - the process through which allocations are made
 - Issue 2 - length of the allocation process
 - Issue 4 - types of quotas
 - Issue 5 - the evaluation criteria
2. Oversight by the State and NMFS:
 - Issue 3 - role of government in oversight (*includes specific FMP amendment text*)
 - Issue 6 - extent of government oversight of CDQ subsidiaries
3. Allowable Investments - Non-Fisheries Projects
 - Issue 7 - allow CDQ groups to invest up to 20% pollock royalties in non-fisheries projects (*includes specific FMP amendment text*)
4. Issue 8 - relaxing requirements for quota transfers and alternative fishing plans

Summary of Status and NMFS's Recommendations on BSAI Amendment 71

1. NMFS has suspended work on a proposed rule that would address all of the eight issues in one rulemaking package, primarily due to continued legal and policy questions about the appropriate role of NMFS and the State in oversight of the CDQ Program and concerns that more analysis work is needed on the government oversight elements of Amendment 71.
2. NMFS recommends that the Council split BSAI Amendment 71 into two FMP amendments in order to proceed with elements of Amendment 71 that are needed immediately and do not appear to have outstanding legal and policy questions.

Amendment 71a would address the allowance for investment in non-fisheries projects and the revision to the statement of purpose for the CDQ Program. NMFS would

proceed with this FMP amendment and regulatory amendment as a high priority for completion by the end of 2004.

Amendment 71b would address the role of NMFS and the State in oversight of the CDQ Program. As described below, NMFS needs to address a new legal issue that has arisen related to NMFS's environmental review responsibilities for CDQ economic development projects before this part of Amendment 71 can proceed. Additional analysis will have to be brought back to the Council on Amendment 71b. Regulatory amendments for revisions to the CDQ allocation process could be made as part of the Amendment 71b package or separately, depending on how the Council decides to proceed in the future on Amendment 71b and the government oversight issues.

3. NMFS recommends that the minor administrative regulatory amendments in Issue 8 of the Amendment 71 package (quota transfers, alternative fishing plans) be implemented through a regulatory amendment that is separate from the regulatory amendments associated with Amendment 71a or Amendment 71b. These management measures are not related to any proposed FMP amendment text. NMFS would proceed with this regulatory amendment as a high priority for completion by the end of 2004.
4. No regulatory revisions will be made before the next CDQ allocation cycles starts in the fall of 2004. Therefore, the 2006-2008 CDQ allocation process will proceed following existing regulations, with the addition of an administrative appeals process recommended by NOAA GC, which will follow existing administrative appeals regulations at §679.43. The State will voluntarily submit its CDQ allocation recommendations to NMFS earlier than required to accommodate the time needed for the appeals process. This process will start on October 1, 2004 and conclude on December 31, 2005. A more detailed schedule for the allocation process is on page 7 of this document.

Regulatory revisions for the 2009-2011 CDQ allocation cycle will be needed by 2007. This gives us time to see how the administrative appeals process works with 2006-2008 CDQ allocations before making a final decision about how to revise regulations for the CDQ allocation process under Amendment 71.

Background on NMFS's Recommendations

Separate Rulemaking for Non-Fisheries Projects (Amendment 71a)

NMFS proposes separating the issues in Amendment 71 and going forward with the Council's recommendations under Issue 7 as Amendment 71a. This separate action would implement the following Council recommendations:

1. Revise NMFS regulations to allow investments in non-fisheries related projects as recommended in the Council's motion on Amendment 71, Issue 7.
2. Allow each CDQ group to invest up to 20% of its previous year's pollock CDQ royalties. This limit represents the annual maximum amount of investment in non-fisheries related projects. Each CDQ group may decide the appropriate mix of investments up to the maximum and any group may choose to invest less than the maximum.
3. Require that any non-fisheries related investment be made in economic development projects in the region of Alaska represented by the CDQ groups and be self-sustaining. In-region extends to the borders of the 65 communities that participate in the CDQ Program.
4. Revise the statement of purpose for the CDQ Program as follows: "The goals and purpose of the CDQ Program are to allocate CDQ to qualified applicants representing eligible Western Alaska communities as the first priority, to provide the means for investing in, participating in, starting or supporting commercial fisheries business activities that will result in an on-going, regionally based fisheries economy and, as a second priority, to strengthen the non-fisheries related economy in the region."
5. Revise NMFS regulations to reflect that the intent of this revised statement of purpose is that fisheries-related projects will be given more weight in the allocation process than non-fisheries related projects.

We would try to get a final rule for this allowance in effect by the end of 2004, ideally before the State has to issue its 2006-2008 CDQ allocation recommendations. The CDQ groups could include non-fisheries projects in the draft 2006-2008 CDPs as a separate section or chapter of the CDP. This approach anticipates approval of this allowance by the Secretary of Commerce, but also provides flexibility in case the final rule is not effective at the time NMFS has to initially approve the CDPs in mid-2005.

Oversight Issues (Amendment 71b)

In a letter dated November 17, 2003, the U.S. Fish and Wildlife Service (USFWS) concluded that NMFS is taking a federal action under the Endangered Species Act (ESA) when it approves Community Development Plans and amendments to the plans. A copy of this letter is attached to your action memo. The USFWS has concluded that NMFS is authorizing these economic development projects and, therefore, has a responsibility to consult with the USFWS on these projects under the ESA before NMFS can make a decision about approval or disapproval of a CDP or amendment to a CDP.

NOAA General Counsel generally agrees with the USFWS on this conclusion and has advised NMFS that “approval and amendment of CDPs likely are agency action subject to the consultation requirements of the ESA.” This conclusion also will very likely lead to the conclusion that NMFS’s approval of plans and amendments also require environmental review under the National Environmental Policy Act (NEPA). These additional responsibilities would require NMFS to conduct some level of environmental review for the CDP as a whole and for any amendments to the CDP for specific economic development projects before NMFS could approve those actions. NMFS has not fully evaluated the process that would be required or the agency resources necessary to fulfill these additional environmental review responsibilities. However, it is certain that they would lead to additional review responsibilities for NMFS staff and additional information requirements for the CDQ groups. It would take longer for NMFS to approve CDPs and amendments proposing specific economic development projects if environmental review responsibilities are added to NMFS’s approval requirements. The CDQ groups may be required to prepare and submit draft environmental review documents as part of the CDP and amendment process, or NMFS may be required to prepare these documents. Either way, the time and administrative process involved for NMFS to develop or approve ESA or NEPA documents can be lengthy. It is likely that the current 30-day period for NMFS review of proposed economic development projects (CDP amendments) would have to be significantly expanded for some types of projects.

These environmental review requirements are a result of the part of NMFS’s CDQ regulations that require the CDQ groups to get prior approval from NMFS before spending money, conducting activities, or undertaking economic development projects described in the CDP or in amendments to the CDP. Before taking on this larger role, NMFS needs to further examine the extent of its legal responsibilities for environmental review and provide the Council, State, and CDQ groups with an assessment of the impacts on the program and the agencies.

NMFS also needs to examine the alternative of removing the requirement for NMFS prior review and approval of CDPs and amendments from Federal regulations. This alternative should be added to the Amendment 71b analysis of Issue 3 (role of government in oversight) and would be an expansion of the existing discussion in the analysis about the oversight approaches of requiring prior approval for all significant activities versus evaluating a CDQ group’s performance during the allocation process.

NMFS's initial recommendations are that this alternative include the following elements:

- (1) NMFS would continue to review and approve or disapprove the State's recommendations about CDQ allocations;
- (2) the CDQ groups could be required to submit a CDP as part of the allocation process, but NMFS would not approve or disapprove that plan at the time it approves allocations;
- (3) NMFS would no longer require the CDQ groups to obtain approval from NMFS for amendments to the plans or approval from NMFS before proceeding with new CDQ projects.

NMFS has discussed this idea with the State and some members of the State CDQ Team believe that removal of regulations that require prior approval of CDPs and amendments by NMFS would not prevent the State from maintaining and enforcing such requirements in its regulations. This issue and others would be the subject of further analysis. The continued analysis of oversight issues in Amendment 71b would be a lower priority for staff work for the remainder of 2004 (see staff task priority list on page 11).

Separate Rulemaking for Revisions to Quota Transfers and Alternative Fishing Plans

NMFS also recommends implementing the regulatory amendments in Issue 8 of the Amendment 71 package through a separate regulatory amendment. These proposed regulatory amendments would simplify the process for making quota transfers and obtaining approval of alternative fishing plans by removing some information requirements and by removing the requirement that applications for these actions be approved by the State of Alaska before being submitted to NMFS.

From the Council's motion on Issue 8:

The Council adopted Alternative 2, all three options.

- Option 1: Allow CDQ groups to transfer quota by submitting a transfer request directly to NMFS.
- Option 2: Allow NMFS to approve PSQ transfers directly, allow the transfer to PSQ during any month of the year, and allow PSQ transfer without an associated transfer of CDQ.
- Option 3: CDQ groups would submit alternative fishing plans directly to NMFS.

We would try to have this regulatory amendment implemented by the end of 2004.

2006-2008 CDQ Allocation Process

Considering the pending status of the proposed rule package for Amendment 71, we will not have revisions to the regulations governing the CDQ allocation process in time for the start of the next allocation cycle for 2006-2008 allocations. We can continue to use our existing regulations, however, NMFS must add an administrative appeals process that provides the CDQ groups a meaningful opportunity to appeal NMFS's initial decision about whether to approve or disapprove the State's CDQ allocation recommendations. This can be accomplished if the State is willing to voluntarily submit its CDQ allocation recommendations to NMFS well before the October 15 deadline currently in NMFS's regulations. The State has agreed to this proposal.

Under this proposal, the CDQ allocations would operate as follows:

1. Use the existing CDQ allocation process regulations in 679.30 that requires the State to submit its allocation recommendations to NMFS by October 15 (2005).
2. Follow NOAA GC's legal advice that we must provide issue an initial decision about approval/disapproval of the State's allocation recommendations and provide the CDQ groups an opportunity to administratively appeal.
3. Use existing administrative appeals process regulations in 679.43 that apply to all of part 679 (which includes the CDQ Program) to guide the administrative appeals process. These regulations provide for a 60 day appeals filing period and a 30 day review period by the RA after the OAA issues its decision.
4. The State would voluntarily submit its allocation recommendations well before the October 15, 2005 deadline to provide NMFS more time to issue an IAD and provide an administrative appeals process with the expectation that the appeals process will be concluded and NMFS can make a final decision on CDQ allocations by December 31, 2005. If NMFS was unable to complete the administrative appeals process before December 31, 2005, we'd rely on NOAA GC's September 3, 2003, legal opinion that advises us that we'd have to leave the existing (2003-2005) CDQ allocations in place until the agency takes final action to replace them (e.g. approves allocations for 2006-2008).
5. If, for some reason, the State cannot submit its allocation recommendations until NMFS's regulatory deadline of October 15, 2005, NMFS would issue an IAD by December 1, 2005 (our 45-day deadline) and then we'd have an open filing period for administrative appeals through February 1, 2006. Under this scenario, we know that we will not be able to resolve appeals by January 1, 2006 because we'll still be in the middle of the 60 day appeal filing period. We'd rely on NOAA GC's legal opinion advising that the existing (2003-2005) CDQ allocations would remain in place until the agency takes final action to replace them.

Proposed Schedule for 2006-2008 CDQ Allocations (using current NMFS regulations and State voluntarily submitting information to NMFS before it is required to).

| Milestone | Dates |
|--|-------------------|
| State's application period begins | October 1, 2004 |
| CDQ groups submit proposed CDPs to the State | November 1, 2004 |
| State holds public hearing | December 1, 2004 |
| State issues initial CDQ allocation recommendations | December 10, 2004 |
| State accepts comments from groups (end of comment period) | January 10, 2005 |
| State consults with Council | April 2005 mtg |
| State submits allocation recommendations to NMFS | April 15, 2005 |
| NMFS SF Division issues IAD (45 days from State submission) | June 1, 2005 |
| Deadline for CDQ group to file an appeal (60 days from IAD) | August 1, 2005 |
| Final decision on appeals (gives 4 months to consider appeals) | December 1, 2005 |
| RA has 30 days to review appeals decision | December 31, 2005 |
| Final agency action on CDQ allocations (and 2003-2005 allocations expire) | December 31, 2005 |

Incorporating New Crab CDQ allocations from the Crab Rationalization Program

Currently, there are six crab quota categories that are allocated to the CDQ Program:

Bristol Bay red king crab
 Norton Sound red king crab
 Pribilof Island red and blue king crab
 St. Matthew blue king crab
 Bering Sea C. opilio crab
 Bering Sea C. bairdi crab.

Percentage allocations of the six crab CDQ reserves that currently exist have been allocated among the six CDQ groups through the end of 2005 (which includes the 2005-2006 crab seasons, if any of these crab fisheries start in the fall of 2005 and extend into the first part of 2006).

The crab rationalization program will make two changes to the allocations of crab to the CDQ Program. It will increase the allocation of crab to the CDQ Program from 7.5 percent of the guideline harvest levels to 10 percent of the GHF for all crab fisheries, except Norton Sound red king crab (which is not included in the rationalization program). In addition, two new crab CDQ allocations will be added to the CDQ Program in 2005:

Eastern Aleutian Islands brown (golden) king crab
Adak red king crab

These two crab fisheries have not had CDQ allocations in the past.

NMFS's schedule for implementation of the crab rationalization program plans to have a final rule authorizing the program published in March 2005. Crab quota shares will be issued in time for the first crab fishery that occurs after March 2005, which is the Aleutian Islands brown (golden) king crab fishery (opens on August 15, 2005). This is one of the new CDQ crab categories, which will have a 10% CDQ allocation. NMFS assumes that the CDQ groups will want to participate in this fishery as early as the August 15 opening date. The Adak red king crab fishery opens on October 15 (if a fishery occurs). This means the State of Alaska and NMFS must develop and approve percentage allocations of these crab CDQ reserves among the CDQ groups for 2005. Allocations beyond 2005 for these two new quota categories will be included in the regular 2006-2008 allocation process and do not have to be handled separately from any of the other CDQ species for 2006-2008. It is only the allocations for the two new crab categories for the end of 2005 that pose the problem because they were not included in previous allocations approved for 2003-2005.

Allocations for these two new crab CDQ categories for the fall of 2005 could be included in the allocation process for the 2006-2008 CDQ allocation cycle. It is possible that a final administrative decision by NMFS on the allocations for the 2006-2008 cycle will occur as early as August 1, 2005. However, a final decision on these allocations that early in 2005 depends on NMFS issuing an initial administrative determination to approve the State's allocation recommendations by June 1, 2005, and on the CDQ groups not administratively appealing the IAD.

Upon issuance of an IAD, the CDQ groups have 60 days to file an administrative appeal. If no appeals are filed about NMFS's approval of the State's 2005 allocation recommendations for the two new crab quota categories, then these percentage allocations would be final at the end of the 60 day period (August 1, 2005). However, if a CDQ group files an appeal that directly or indirectly involves these two new crab quota categories, then the final decision about these 2005 CDQ allocations could not be made by NMFS until the administrative appeal was resolved, which is likely to be December 31, 2005. If this occurred, then NMFS would not be able to approve allocations for these two new crab quota categories in 2005.

Whether the CDQ groups could harvest crab in the two new quota categories from their 2005 CDQ allocations after December 31, 2005 depends on the seasons that are specified for these fisheries under the crab rationalization program. Some crab fisheries start in the fall of one year

and continue on into the first part of the next calendar year. If this occurred for the Aleutian Islands brown king crab or Adak red king crab, it would be possible for the CDQ groups to harvest crab from the 2005 allocation after January 1, 2006. However, the season ending dates for the crab fisheries under the crab rationalization program are not known at this time (and will have to be established by the State of Alaska). Therefore, including the 2005 allocations of the two new crab CDQ categories in with the 2006-2008 CDQ allocation cycle does not guarantee that the CDQ groups will be able to harvest crab from these CDQ fisheries in 2005.

The only way to guarantee that the new allocations will be ready by August 15, 2005, is to conduct a separate allocation process for the 2005 allocations of just the two new crab CDQ categories and start that allocation process in the summery of 2004. This would provide sufficient time for these allocations to be finalized by August 15, 2005. However, conducting a completely separate CDQ allocation process on a five month earlier timeline than the overall 2006-2008 allocation cycle would be extremely time consuming and expensive for NMFS, the State, and the CDQ groups. NMFS and the State discussed these options and agreed that the 2005 allocations for the two new crab categories had to be included with the 2006-2008 allocation cycle and that we would not hold two separate allocation cycles during 2004 and 2005 to accommodate the two new crab categories. If a CDQ group appeals NMFS's IAD on these two crab categories, CDQ fishing on the 2005 allocations of these species will depend upon whether fishing is allowed on the two crab species in early 2006.

(b) CDQ Fishery Management Issues

A discussion paper attached to your action memo, prepared by Obren Davis, describes an analysis that he is developing for alternatives to address anticipated future problems managing the smaller rockfish CDQ reserves and to provide more flexibility to adjust the CDQ reserve categories and allocations to the groups when the Council recommends splitting or joining TAC categories during the annual specifications process.

NMFS requests that the Council schedule initial review of this analysis at its June 2004 meeting and final action at its October 2004 meeting. Any regulatory revisions made as a result of Council action in October 2004 would not be effective until mid to late 2005 for the 2006 groundfish specifications process and in time for the 2006-2008 CDQ allocation cycle.

The initial draft will analyze the following alternatives:

Alternative 1: No action. Continue to establish CDQ reserves for every annual TAC category except squid. All CDQ reserves would be allocated among CDQ groups, with the exception of "other species." The CDQ groups would continue to be prohibited from exceeding any of the CDQ allocations made to the group.

Alternative 2: Modify the annual groundfish specifications regulations to allow the Council to recommend each year (1) which CDQ reserves would be allocated among the groups and which CDQ reserves would not be allocated among the groups, and (2) how to manage new TAC categories created by joining existing TAC categories by species or area among the CDQ groups.

Option 1: Reallocate squid to the CDQ Program and incorporate into this process.

Alternative 3: Amend NMFS regulations to specify which TAC categories would be allocated to the CDQ groups and which TAC categories would not be allocated to the CDQ groups. Any changes to these specifications would have to be made by a subsequent regulatory amendment.

Option 1: Reallocate squid to the CDQ Program and incorporate into this process.

Staff Tasking - Current Priorities for CDQ Staff

Highest Priorities for 2004

1. Crab rationalization: Regulations and FMP amendments associated with oversight and administration of the allocation of WAI brown crab to Adak. (Bibb and Davis)
2. AI pollock allocation: Analysis and regulations for oversight and administration of the allocation of AI pollock to the Aleut Corporation. (Bibb)
3. BSAI Amendment 71a and allowance for non-fisheries investments - Issue 7 in Amendment 71. (Bibb, request assistance from Nicole Kimball on analysis)
4. Preparation of analysis for CDQ fisheries management revisions needed to manage CDQ allocations in the future. (Davis)
5. Regulatory amendments to relax requirements for CDQ quota transfers and alternative fishing plans - Issue 8 in Amendment 71. (Carls)
6. Monitoring status of CDQ eligible communities and completing rulemaking, if necessary (Davis)
7. Any tasks associated with the 2006-2008 allocation process.

Lower Priority for 2004

1. Continued analysis of Amendment 71b - oversight issues.
2. Implementation of regulations revising the CDQ allocation process under Amendment 71. Not needed until 2007 for the 2009-2011 CDQ allocation process.